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NO. 75009-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARGARET RUBLEE, Individually and as Personal Representative of the Estate of VERNON D. RUBLEE,

Plaintiff-Appellant,

v.

PFIZER INC.,

Defendant-Appellee,

BRIEF OF DEFENDANT APPELLEE PFIZER INC.

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INTRODUCTION

Plaintiff-Appellant Margaret Rublee ("Plaintiff") invokes a rarely used and largely obsolete aspect of products liability law—the apparent manufacturer doctrine—in an attempt to make an end run around a federal asbestos injury trust established to ensure equitable compensation among claimants. Like other courts to consider this ploy, the trial court rejected it, ruling the apparent manufacturer doctrine inapplicable. This ruling is correct and should be affirmed.

Under modern products liability law, sellers as well as manufacturers are subject to strict liability for injuries caused by products that they manufacture or sell. Before adoption of strict liability, however, sellers were subject to more lenient liability standards than manufacturers. The apparent manufacturer doctrine estops sellers that act as if they manufactured a product from relying on the more lenient seller standards.

Plaintiff would have had a viable strict liability claim against Quigley Company, Inc., which manufactured and sold two products—Insulag and Panelag—that contained asbestos that allegedly injured her late husband. Quigley, however, was forced into bankruptcy by over 100,000 claims of injury from exposure to asbestos in its products. While Quigley's reorganization plan creates an asbestos injury trust with nearly $1 billion in funds, the trust forces claimants to accept restrictions on relief. Plaintiff seeks to avoid the trust's restrictions by suing Pfizer Inc., Quigley's corporate parent during the last six years in which Insulag and Panelag were sold, under the apparent manufacturer doctrine, which is an exception to the channeling injunction. Plaintiff invokes this doctrine even though Pfizer never sold (or manufactured) the Quigley products.

Other plaintiffs, some represented by the counsel representing Plaintiff in this case, have tried the same tactic, but courts have universally rejected it. Two federal district court judges in the Western District of Washington dismissed claims against Pfizer under the apparent manufacturer doctrine, ruling the doctrine inapplicable because it applies only to sellers and others in the chain of distribution, and there was no genuine issue concerning an essential element of an apparent manufacturer claim: "putting oneself out" as a manufacturer. *See Turner v. Lockheed Shipbuilding Co.*, No. C13-1747 TSZ, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013) (applying Washington law); *Sprague v. Pfizer, Inc.*, No. 14-5084 RJB, 2015 WL 144330, at *3-5 (W.D. Wash. Jan. 12, 2015) (same), *appeal filed*, Jan 5, 2015 (9th Cir.). The Maryland Court of Special Appeals rejected another apparent manufacturer claim against Pfizer on the ground that the plaintiff failed to satisfy another essential element of the apparent manufacturer doctrine: reasonable reliance. *See*

Stein v. Pfizer, Inc., 137 A.3d 279, 299 (Md. Ct. Spec. App. 2016), *cert. denied*, -- A.2d -- (Md. Sept. 29, 2016).

Plaintiff's apparent manufacturer claim, which is based on evidence virtually identical to the evidence presented in the Western District of Washington and Maryland actions, likewise fails. Here, the trial court considered whether Plaintiff had raised any genuine issue concerning the doctrine's "putting out" and reliance requirements. Noting that Quigley clearly and accurately identified itself as the manufacturer of both Insulag and Panelag, the trial court ruled that Plaintiff had failed to raise any genuine issue whether Pfizer "put itself out" as the manufacturer. The court also ruled that Plaintiff had failed to raise any genuine issue concerning reliance because no reasonable purchaser would have been induced to believe that Pfizer was the manufacturer.

These rulings should be affirmed. The undisputed record shows that after Pfizer acquired Quigley, Quigley continued to manufacture and sell Insulag and Panelag, and Quigley repeatedly informed purchasers that it continued to manufacture the products and that Pfizer was its parent. Indeed, the packages for both Insulag and Panelag state that the products were "Manufactured by **QUIGLEY COMPANY INCORPORATED**," a "subsidiary of Pfizer." CP 567, 182, 1824 (emphasis in original). Plaintiff points out that some Quigley documents include logos for Pfizer as well as

Quigley, and argues that, viewed in isolation, the logos suggest that Pfizer played some role in manufacturing. The logos, however, must be considered in context, in light of the rest of the documents in which they appear and Quigley's repeated statements that it continued to manufacture the products. In addition, Plaintiff's testimony about how workers and the general public might have viewed the Pfizer logos is irrelevant because Insulag and Panelag are industrial products which are purchased not by the general public, but by large and sophisticated industrial entities. The trial court correctly found that, based on this record, no reasonable jury could find that Pfizer put itself out as the manufacturer of these products, and no reasonable purchaser could have believed Pfizer to be the manufacturer.

Finally, Plaintiff's claim fails for an even more fundamental reason not reached by the trial court: the apparent manufacturer doctrine applies only to sellers or distributors, and it is undisputed that Pfizer was not in the chain of distribution.

The judgment dismissing the apparent manufacturer claim against Pfizer should be affirmed.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the trial court correctly held that there was no genuine issue whether Pfizer "put out" itself as the manufacturer of Insulag and Panelag.

2. Whether the trial court correctly held that there was no genuine issue concerning reliance.

3. Whether the trial court's order may be affirmed on the alternative ground that Pfizer was not a retailer or distributor for Insulag and Panelag, because the apparent manufacturer doctrine applies only to parties in the chain of distribution.

COUNTERSTATEMENT OF THE CASE

A. Quigley's Manufacture And Sale Of Insulag And Panelag

Quigley manufactured and sold heat-resistant, or "refractory," products to shipyards, steel plants, and other major industrial operations for high-temperature applications such as lining industrial furnaces and turbines. CP 915, 950. Among the refractory products manufactured and sold by Quigley were Insulag and Panelag, cement-like powders designed to be mixed with water and applied to the surface of areas exposed to extreme heat. CP 1793, 1796.

For decades, Quigley manufactured and sold both Insulag, which was trademarked in 1936, and Panelag, which was trademarked in 1945. In their original form, both products contained chrysotile asbestos. CP 571. In the early 1970s, Quigley developed "Insulag AF" and "Panelex," asbestos-free versions of Insulag and Panelag, and in 1974 it informed consumers that it had discontinued the sale of both Insulag and Panelag. CP 93, 95, 97.

B. Pfizer's 1968 Acquisition Of Quigley

In 1968—six years before Quigley discontinued Insulag and Panelag—Pfizer acquired Quigley's capital shares, and Quigley became a wholly-owned subsidiary of Pfizer. CP 103-04.

After the acquisition, Quigley continued to operate as a separate corporation. CP 111, 114. It continued to manufacture both Insulag and Panelag, retaining title to the plant where the products were made, and purchasing the raw materials used to make them. CP 121-22, 134-49, 151-73, 314, 322-23, 365. Quigley also continued to handle the sales and distribution of both products, maintaining its own sales force, which met regularly with customers, and receiving and filling purchase orders from those customers. CP 117-18, 176-77, 309, 326, 337, 360-61, 377, 380-81, 390-91, 420-425, 1826-31, 1833-34, 2595.

After the acquisition, Quigley's sales force continued to communicate with purchasers and distributors on "Quigley Company, Inc." stationary and to sign their letters on behalf of "QUIGLEY COMPANY, INC." *See, e.g.*, CP 1806, 1828. Acknowledging the acquisition, the stationary stated that Quigley was a "subsidiary of PFIZER, INC." and contained a small Pfizer logo in the upper left hand corner. *Id.* Quigley similarly issued invoices from "Quigley Company, Inc.," which stated that Quigley was a "[s]ubsidary of PFIZER, Inc." and contained a Pfizer logo in the upper left hand corner. *See, e.g.*, CP 977. Purchasers and distributors continued to send purchase orders and related letters to "Quigley Company, Inc.," CP 1826, 1827, 1829, 1833, 1834, and distributors continued to advertise themselves as distributors for "Quigley Co." without any reference to Pfizer, CP 2595, 2599, 2603.

The labels for Insulag and Panelag expressly noted that the products were manufactured by Quigley and that Quigley was a subsidiary of Pfizer. CP 204, 228, 1821, 1824. For example, the Panelag label reproduced below states at the bottom, in bold and all capital letters, that the Product was "Manufactured by **QUIGLEY COMPANY INCORPORATED**" and that Quigley is a "Subsidiary of Chas. Pfizer & Co., Inc.":

CP 567.

Safety and promotional materials distributed by Quigley after Pfizer's acquisition similarly continued to identify Insulag and Panelag as Quigley products. For example, OSHA material data sheets for Insulag list the manufacturer's name as "QUIGLEY COMPANY, INC." CP 1809, 1811. Similarly, the first page of an Insulag marketing bulletin states that Insulag is "*A Quigley Product*," CP 2402 (emphasis in original), and other promotional materials include Insulag and Panelag in lists of "QUIGLEY REFRACTORIES and INSULATIONS." CP 2360; *see also* CP 2396 (including Insulag and Panelag listing of "Quigley Products").

C. The Quigley Bankruptcy And Asbestos Injury Trust

Like other manufacturers of products containing asbestos, Quigley has been sued by many individuals claiming injury from exposure to asbestos. In fact, by September of 2004, more than 160,000 plaintiffs had filed asbestos-related suits against Quigley. *In re Quigley Co.*, No. 04-15739(SMB), 2008 WL 2097016, at *1 (Bankr. S.D.N.Y. May 15, 2008) (alteration in original), *rev'd*, 449 B.R. 196 (S.D.N.Y. 2011), *aff'd*, 676 F.3d 45 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2849 (2013). Although Pfizer owned Quigley for only six years out of the many decades that the company sold Insulag and Panelag, over two-thirds of these suits also named Pfizer. *Id.*

Lacking the resources to fully compensate all these claimants, Quigley was forced to file for bankruptcy. *Id.* In August 2013, the United States District Court for the Southern District of New York approved a reorganization plan creating an asbestos injury trust under Section 524(g) of the Bankruptcy Code to compensate asbestos claimants. CP 185. This trust includes approximately $965 million funded by Pfizer. CP 49-50.

D. The Channeling Injunction

To protect the asbestos claimants trust and ensure an equitable distribution of relief to all claimants, the United States District Court for the Southern District of New York issued a channeling injunction. CP 49-50. This injunction requires parties claiming injury from exposure to asbestos in Quigley products to seek relief solely from the trust, and enjoins them from suing Quigley for asbestos-related injuries. CP 49. The injunction also bars asbestos-related injury claims against Pfizer that are based on Pfizer's prior ownership, management, or control of Quigley, such as claims asserting a "'piercing the corporate veil' theory" or "successor liability theory." *See In re Quigley*, 676 F.3d 45, 60 & n.18 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2849 (2013).

However, in earlier litigation concerning a preliminary injunction issued by the bankruptcy court, both the district court and the Second Circuit held that asbestos claimants could sue Pfizer under the apparent manufacturer doctrine because a claim under that doctrine might not be based on Pfizer's prior ownership or control of Quigley. *See id.* at 59-62. Accordingly, to the extent permitted by the Second Circuit's decision, the channeling injunction does not enjoin asbestos claimants from bringing claims against Pfizer "alleging a theory of apparent manufacturer liability under Section 400 of the Restatement (Second) of Torts or other applicable non-bankruptcy law." CP 50.[1]

E. The Proceedings Below

Seeking to exploit the channeling injunction's narrow exception, Plaintiff's counsel has brought several apparent manufacturer claims against Pfizer relating to exposure to Insulag and Panelag. The first of these claims was brought in the United States District Court for the Western District of Washington, which granted summary judgment to Pfizer and dismissed the claim in December 2013. *See Turner v. Lockheed Shipbuilding Co.*, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013). Though initially appealed, the appeal was voluntarily dismissed by Plaintiff's counsel in February 2014. Plaintiff's counsel filed another apparent manufacturer claim against Pfizer in the Western District of Washington in January 2013, which was also dismissed on summary judgment. *See Sprague v. Pfizer, Inc.*, 2015 WL 144330 (W.D. Wash. Jan. 12, 2015). This ruling is currently on appeal and has been stayed

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[1] In making their rulings, neither the district court nor the Second Circuit addressed—let alone decided—the merits of the "apparent manufacturer" claims. The only issue before these courts was the scope of the bankruptcy injunction. As the district court made clear: "Whether appellant would ultimately prevail on its apparent manufacturer claims if freed from the present injunction is far beyond the purview of this Court and irrelevant to its analysis of the proper scope of [a channeling injunction]." *In re Quigley*, 449 B.R. at 203 n.3.

pending resolution of this appeal. *See* Order, *Sprague v. Pfizer*, No. 15-25051 [Doc. 30] (9th Cir. Sept. 27, 2016).

1. <u>Plaintiff's Claim</u>

In September 2014, Vernon and Margaret Rublee sued Pfizer and several other defendants, alleging that Mr. Rublee was suffering from mesothelioma caused by exposure to asbestos products while working as a machinist at the Puget Sound Naval Shipyard ("PSNS") from 1965 to 2005. CP 1-4. The Rublees brought negligence and strict liability claims against most of the defendants. They sued Pfizer, however, under the apparent manufacturer doctrine. *Id.* When Mr. Rublee died in March 2014, the action against Pfizer was converted to a wrongful death action on behalf of Mr. Rublee's estate and his surviving spouse.

2. <u>The Summary Judgment Order</u>

As in the *Turner* and *Sprague* cases, Pfizer moved for summary judgment at the close of discovery. Pfizer argued that Plaintiff's apparent manufacturer claim fails as a matter of law for three separate and independent reasons. First, the apparent manufacturer doctrine applies only to sellers, and Pfizer did not sell Insulag or Panelag. CP 669-72. Second, Plaintiff failed to raise a genuine issue on the core element of an apparent manufacturer claim: namely, whether Pfizer "put out" itself to purchasers as the manufacturer of Insulag and Panelag. CP CP 672-73.

Third, Plaintiff failed to satisfy another essential element of an apparent manufacturer claim, reliance, because no reasonable purchaser could have believed that Pfizer manufactured Insulag and Panelag. CP 674-78.

The trial court granted summary judgment. It did not reach the question whether the apparent manufacturer doctrine can be applied to a defendant that did not sell the products in question and is outside the products' chain of distribution. Instead, the court held that Plaintiff had failed to raise a genuine issue concerning the "putting out" requirement because this requirement must be judged through the "prism" of a reasonable purchaser, and "Quigley was clearly and accurately identified as a/the real manufacturer" of the products. CP 2929. The trial court also held that Plaintiff had failed to raise a genuine issue concerning reliance because "a reasonable purchaser would not have been induced to believe that the defendant was such apparent manufacturer" of the products in question. *Id.* Accordingly, the trial court dismissed the apparent manufacturer claim against Pfizer. *Id.* In addition, the court certified this ruling for interlocutory appeal. *Id.*

ARGUMENT

Because Mr. Rublee allegedly was exposed to asbestos before the Washington Products Liability Act was enacted in 1981, Plaintiff could have brought a strict liability claim against Quigley and attempted to bring a derivative claim against Pfizer for the injury allegedly caused by the exposure. *See Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 584, 915 P.2d 581 (1996). The channeling injunction in Quigley's bankruptcy plan, however, would have forced Plaintiff to bring that claim before the asbestos injury trust, where relief would have been restricted. To avoid this restriction, Plaintiff sued Pfizer under the apparent manufacturer doctrine.

The apparent manufacturer doctrine is a largely moribund rule that no Washington court has considered since this Court declined to apply it more than four decades ago. *See Martin v. Schoonover*, 13 Wn. App. 48, 54, 533 P.2d 438, 442 (1975); *Stein v. Pfizer*, 137 A.3d 279, 290 n.15 (Md. Ct. Spec. App. 2016) (describing the doctrine as "quaintly obsolete") (quotation omitted). It was formulated in the early twentieth century when sellers and manufacturers were subject to different liability standards. *See Hebel v. Sherman Equip.*, 442 N.E.2d 199, 201-03 (Ill. 1982) (recounting development of the doctrine). Under modern products liability law, sellers and manufacturers are both generally subject to strict liability for personal injuries caused by products made or sold by them. *See* Restatement (Third) of Torts: Prods. Liab. § 14 cmt. *a* (1998). Before the adoption of strict liability, however, sellers were treated more leniently than manufacturers and were held liable for defects in goods sold only if they knew or had reason to know of the defects. *See* Restatement (Second) of Torts §§ 399, 401-02 (1965); *see also id.* §§ 394-98 (describing the more stringent standard for manufacturers). The apparent manufacturer doctrine, which was formalized in Section 400 of the first Restatement of Torts, is a "species of estoppel," which subjects sellers to the same liability as manufacturers if the sellers represented themselves to be the manufacturer of the products sold. *See Hebel*, 442 N.E.2d at 202.

To prevail on an apparent manufacturer claim, a plaintiff must prove two things. *First*, the plaintiff must show that the seller "puts out as his own" a product that was manufactured by another, that is, that the seller represents to purchasers that it manufactures the goods in question or has them manufactured for it. *See* Restatement (Second) of Torts § 400 ("One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."); *see also Martin*, 13 Wn. App. 48, 533 P.2d at 442 (noting that the doctrine applies where "a retailer adopts a product as his own"). *Second*, the plaintiff must show reliance on the seller's representation. *See, e.g.*, *Carney v. Sears, Roebuck & Co.*, 309 F.2d 300, 304 (4th Cir. 1962) ("[T]he basic test is whether or not the vendee reasonably believed in and relied upon the vendor's apparent manufacture of the product."); *Nelson v. Int'l Paint Co.*, 734 F.2d 1084, 1087-88 (5th Cir. 1984) (defendant may be held liable where it "has induced such reliance on the part of consumers"). Moreover, the doctrine generally applies only to defendants that sell or distribute the product in question. *See, e.g.*, *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 136 (9th Cir. 1989); *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1463 (2d Cir. 1995).

Plaintiff's claim fails each of these requirements. The trial court correctly found that Plaintiff failed to raise a genuine issue concerning the "putting out" requirement. The court also correctly found that there was no genuine issue concerning reliance. Moreover, even if Plaintiff had raised a genuine issue concerning these requirements, her claim would still fail because it is undisputed that Pfizer did not sell or otherwise distribute Insulag or Panelag. Rather Pfizer was the parent of Quigley, the manufacturer and seller, and the apparent manufacturer doctrine does not subject Pfizer to liability because Quigley identified its relationship with Pfizer to purchasers.

I. THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFF FAILED TO SHOW THAT PFIZER "PUT OUT" ITSELF AS THE MANUFACTURER OF QUIGLEY'S PRODUCTS

Plaintiff accuses the trial court of improperly disregarding "[o]verwhelming [e]vidence" that Pfizer "put out" Insulag and Panelag as its own products, and of having "[e]rroneously [w]eighed" evidence rather than determining whether there was a genuine issue for the jury. Pl. Br. 12-32. But it is Plaintiff that ignores crucial—and uncontroverted—evidence that Quigley repeatedly told customers that it continued to manufacture Insulag and Panelag after Pfizer's acquisition. As a consequence, Plaintiff fails to consider whether a reasonable jury could have found that Pfizer put itself out as the manufacturer of Insulag and Panelag in the face of these repeated statements. The district court correctly ruled that a reasonable jury could not, and that Plaintiff's apparent manufacturer claim therefore fails as a matter of law.

A. Uncontroverted Evidence Shows That After The Pfizer Acquisition Quigley Repeatedly Informed Purchasers That It Continued To Manufacture Insulag And Panelag

Uncontroverted evidence shows that, after acquiring Quigley, Pfizer did not put out itself as the manufacturer of Insulag and Panelag. To the contrary, Quigley continued to manufacture both products and to sell them; and, even more important, Quigley repeatedly informed purchasers that it continued to manufacture the products and that Pfizer was its parent.

It is undisputed that, after Pfizer acquired Quigley, Quigley continued to operate as an independent company. Numerous Quigley employees testified that the company continued to manufacture Insulag and Panelag, CP 121-22, 134-49, 151-73, 314, 322-23, 365, and that it continued to sell those products, using the same Quigley sales personnel as before, CP 117-18, 176-77, 309, 326, 360-61, 377, 380-81, 390-91, 420-425, 1826-31, 1833-34, 2595. Plaintiff did not—and could not—dispute this testimony.

In addition, documentary evidence shows that, far from suggesting that Pfizer had taken over the manufacture and sale of Insulag and Panelag, Quigley's sales force corresponded with customers on "Quigley Company, Inc." letterhead and signed letters on behalf of "QUIGLEY COMPANY, INC." CP 1806, 1828. In addition, invoices were issued on forms with "QUIGLEY COMPANY, INC." emblazoned on the top. CP 977 (emphasis omitted). And distributors and end users sent letters and purchase orders concerning Insulag and Panelag to "Quigley Company, Inc." CP 618, 1826-27, 1829, 1833-34.

Even more important, Quigley expressly identified itself as the manufacturer of Insulag and Panelag, and Pfizer as Quigley's parent. For example, as shown in the picture above, *see supra* p. 8, the labels on packages of Insulag and Panelag state that the products were manufactured by Quigley and that Quigley is a Pfizer subsidiary:

Manufactured By
QUIGLEY COMPANY, INCORPORATED
Subsidiary of Chas. Pfizer & Co., Inc.

CP 567 (emphasis in original); CP 1821, 1824 (same).

Quigley identified itself as the manufacturer of Insulag and Panelag in other ways well. Advertisements listed Insulag and Panelag as "*Quigley* Refractories and Insulations." CP 2360 (emphasis added). Marketing bulletins described Insulag as "*A QUIGLEY PRODUCT.*" CP 2402. OSHA Material Safety Data Sheets supplied to purchasers listed the "Manufacturer's Name" as "QUIGLEY COMPANY, INC." CP 1809, 1811. And in 1974, when OSHA determined that asbestos fiber is a serious health hazard, Quigley sent purchasers a special report stating that the "QUIGLEY COMPANY" had for many years "produced insulations formulated with asbestos, including Insulag and Panelag." CP 1816. Thus, uncontroverted evidence shows that Quigley repeatedly reminded purchasers of Insulag and Panelag that it continued to manufacture the products after the Pfizer acquisition.

In light of these repeated statements that Quigley continued to manufacture Insulag and Panelag, Plaintiff's apparent manufacturer claim fails. As noted above, an essential element of any apparent manufacturer claims is that the defendant "puts out as his own product a chattel manufactured by another." Restatement (Second) of Torts § 400. A party, however, cannot "put out as his own product" a good that is clearly identified as being manufactured by another. *Id.* § 400, cmt. *d* (noting that a party does not put out goods as its own "where the real manufacturer or packer is clearly and accurately identified"); *Carney*, 309 F.2d at 305 (apparent manufacturer doctrine inapplicable where purchaser has "knowledge of the fact that [the product] was manufactured by someone other than the defendant").

Indeed, the Western District of Washington has twice rejected apparent manufacturer claims brought by parties represented by Plaintiff's counsel in light of the evidence that Quigley repeatedly disclosed that it continued to manufacture Insulag and Panelag. For example, in *Turner* the plaintiffs claimed that Pfizer "put out" Insulag as its own product. 2013 WL 7144096, at *3. Pointing to, among other things, the Panelag label, a bulletin describing Insulag as a Quigley product, and a listing of Quigley refractories and insulations, the *Turner* court held that the plaintiffs' claim in that case failed as a matter of law because, considered both individually and as a whole, "the evidence presented by the Plaintiffs . . . does not suggest that Pfizer manufactured Insulag." *Id.* In *Sprague*, the court similarly concluded that the evidence presented by the plaintiff failed to show that Pfizer put itself out as the manufacturer of Insulag. *Sprague*, 2015 WL 144330, at *4.

B. The Evidence Presented By Plaintiff Does Not Raise A Genuine Issue

In arguing that there is a genuine issue whether Pfizer put out Insulag and Panelag as its own products, Plaintiff points to logos, testimony from her late husband and other workers, and a so-called "branding" expert's opinion. None of this evidence contradicts Quigley's repeated statements to purchasers that it continued to manufacture Insulag and Panelag after the acquisition. Plaintiff does not—and cannot—explain how a reasonable jury could find that Pfizer put out these products as its own in light of these statements.

1. <u>Logos</u>

Plaintiff contends that Pfizer put out Insulag and Panelag as its own product because Pfizer's logo appears along with the Quigley logo on various documents. Even considered in isolation, these logos are at best ambiguous, and no reasonable purchaser considering them in light of Quigley's repeated statements that it manufactured the products could conclude that Pfizer represented itself to purchasers as the manufacturer of Insulag and Panelag.

The Catalog—Plaintiff's brief displays the following combined logo from the bottom of a page of promotional materials:

Pfizer QUIGLEY COMPANY, INC.

Manufacturers of Refractories – Insulations

235 E. 42nd Street New York, N.Y. 10017

Pl. Br. 13 (citing CP 952). Noting that the phrase "Manufacturers of Refractories – Insulations" is plural, Plaintiff contends that the combined logo indicates that both Pfizer and Quigley manufactured "[r]efractories." Quigley, however, described itself as "Manufacturer<u>s</u> of Refractories" in promotional materials dating back to the 1950s, before it was purchased by Pfizer. CP 1728-47, 1792, -93, 1796 (emphasis added), and in the catalog the phrase appears underneath the Quigley, not the Pfizer, logo.

Even more important, the combined logo appears on the ninth page of a bulletin concerning Insulag. CP 2402-2415. As noted above, the first page of this bulletin states that Insulag is "*A Quigley Product*":

INSULAG

Reg. U. S. Pat. Off.

A HIGHLY EFFICIENT INSULATING LAGGING

With Air-setting Properties for a Wide Range of Temperature Applications

WATER RESISTANT—ECONOMICAL

Bulletin No. 332-F *A QUIGLEY PRODUCT*

CP 2402. This bulletin in turn is "part of a larger sort of catalog," CP 125, which includes Insulag and Panelag in lists of "**QUIGLEY ... PRODUCTS**," CP 2396, and "QUIGLEY REFRACTORIES and INSULATIONS," CP 2360.

In light of the clear statements in the Insulag bulletin and elsewhere in the Quigley catalog that Insulag and Panelag were Quigley products, as Plaintiff's own experts conceded, no reasonable purchaser could have thought based on the combined logo cited by Plaintiff that Pfizer was manufacturing Insulag and Panelag. CP 437-38, 2241-42.

The Letterhead—Plaintiff also points to a January 1974 letter concerning Insulag and Panelag with Pfizer's logo "in the upper left hand corner." Pl. Br. 14, 16 (citing CP 963). That letter, however, is clearly from Quigley rather than Pfizer. While Pfizer's logo is in the upper left-hand corner, Quigley's is in the center of the page:


QUIGLEY COMPANY, INC.
235 E. 42ND ST., NEW YORK, N. Y. 10017
JANUARY 2, 1974

CP 963. In addition, the stationary indicates at the bottom that Quigley is "[a] subsidiary of PFIZER, INC.," and the letter is from the "QUIGLEY COMPANY, INC.," and signed by Quigley's vice president for sales. *Id.*

In addition, the letter states that "[w]e are announcing our decision to discontinue the manufacture of . . . Insulag and Panelag." *Id.* (capitalization and underling omitted). Thus, far from supporting Plaintiff, this letter informs purchasers that, up until 1974 Quigley, not its parent Pfizer, was manufacturing Insulag and Panelag.

The Pocket Calendar—Plaintiff's reliance on the 1972 pocket calendars distributed by Quigley (*see* Pl. Br. 14 (citing CP 965-66)) is equally misplaced. The calendar's cover says "Quigley 1972" on top and "QUIGLEY COMPANY INC.[,] a subsidiary of PFIZER, INC." at the bottom. CP 965. Plaintiff points to an interior page which has Pfizer logo on top of the Quigley logo before the phrase "Manufacturers of Refractories[,] Insulation and Process Panels." Pl. Br. 14 (citing CP 966). Plaintiff fails to mention, however, that the phrase "Subsidiary of PFIZER, Inc." appears between the Quigley logo and the quoted phrase, indicating that the phrase refers to Quigley and Quigley is the manufacturer:

Pfizer

QUIGLEY COMPANY, INC.

CP 966.

Annual Reports—Plaintiff points to several annual reports referring to Quigley manufacturing facilities as "Pfizer construction sites" and referencing Quigley as a "division." Pl. Br. 14 (citing CP 968-70); Pl. Br. 15-16 (citing CP 950, 973). Plaintiff, however, does not explain why a reasonable purchaser would infer from these statements that Pfizer was manufacturing Insulag or Panelag. This is not surprising: the reports refer to "refractory specialties manufactured by Quigley Company, Inc." CP 973; *see also* CP 970 (referring to "its [Quigley's] refractory products" and the expansion of "Quigley . . . products").[2] Here again, Plaintiff's evidence contradicts its contentions.

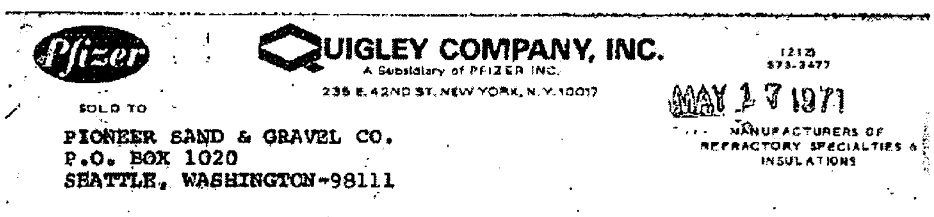
Data Sheets—Plaintiff notes that "Technical Data Sheets" distributed to users of Insulag and Panelag include the Quigley logo. Pl. Br. 14-15 (discussing CP 975). Plaintiff fails to note, however, that the logos identify Quigley as a subsidiary of Pfizer:

Pfizer
QUIGLEY COMPANY INC.
a subsidiary of Pfizer Inc.
235 EAST 42ND STREET NEW YORK, N. Y 10017

[2] Plaintiff also notes references to Quigley as a Pfizer "division." Pl. Br. 14 (citing CP 972-73); Pl Br. 16 (citing CP 973). Plaintiff, however, does not explain how she could escape the channeling injunction if Quigley were a mere division and Pfizer were held liable due to its corporate identity with Quigley.

CP 975. Moreover, any purchaser that received the technical data sheets would have received Material Safety Data Sheets, which, as shown above, *see supra* p. 19, expressly identify Quigley as the manufacturer. *See* CP 1809, 1811.[3]

Invoices—Finally, Plaintiff notes that an invoice sent to Pioneer Sand & Gravel Company contains equally sized Pfizer and Quigley logos. Pl. Br. 15 (citing CP 977). While that is true, the logos are not placed together. Instead, the Quigley logo is at the center of the invoice, with the statement that it is a subsidiary of Pfizer right below, and the statement "Manufacturers of Refractory Specialties & Insulation" is to the right:


Pfizer
QUIGLEY COMPANY, INC.
A Subsidiary of PFIZER INC.
235 E. 42ND ST. NEW YORK, N.Y. 10017
(212) 573-3477
MAY 17 1971
SOLD TO
PIONEER SAND & GRAVEL CO.
P.O. BOX 1020
SEATTLE, WASHINGTON-98111
MANUFACTURERS OF REFRACTORY SPECIALTIES & INSULATIONS

CP 977. It should come as no surprise that Pioneer understood that it was dealing with Quigley, rather than Pfizer, and directed its purchase orders to "QUIGLEY COMPANY, INC." CP 1834.

* * *

[3] Plaintiff notes the instruction that the information on the Technical Data Sheet was not to be distributed without written permission from Pfizer. Pl. Br. 14-15. This instruction, however, appears in small print in the lower right hand of the sheets, CP 975, and Plaintiff fails to explain how this statement suggests that Pfizer is acting as anything other than Quigley's parent.

In addition to pointing to various documents in which the Pfizer logo appears, Plaintiff invokes the Restatement, asserting that a comment "specifically contemplates a situation, like here, where two logos are presented in conjunction with one another." Pl. Br. 19 (citing Restatement (Second) of Torts § 400, cmt. *d*). In fact, the comment discusses a very different situation in which goods are marked with the name of the seller rather than the manufacturer, along with the statement that the goods were "made for" the seller or distributed by it. *Id.* The comment observes that a seller may not escape the apparent manufacturer doctrine by simply identifying itself as the seller or distributor, "particularly in the absence of a clear and distinctive designation of the real manufacturer" because "the casual reader of a label is likely to rely upon the featured name, trade name, or trademark." Restatement (Second) of Torts § 400, cmt. *d.*

The situation here is quite different. Pfizer was not the seller, and, as shown above, the label specifically identified Quigley as the manufacturer, *see supra* p. 8. Furthermore, Insulag and Panelag are industrial goods that were purchased by naval procurement officers, not consumers casually reading labels.

Moreover, to the extent that the Restatement comment applies here, it supports dismissal of Plaintiff's claims. After the passage quoted by Plaintiff, the comment observes that a seller does not put out goods as its own "where the real manufacturer or packer is clearly and accurately identified on the label," or it is otherwise indicated clearly that the goods in question are not the seller's product. Restatement (Second) of Torts, § 400, cmt. *d*. Here, as mentioned above, the label expressly states that Quigley manufactured the goods, and numerous other documents also clearly identify Quigley as the manufacturer. For this reason as well, Plaintiff cannot satisfy the "putting out" requirement based on the inclusion of Pfizer logos in Quigley documents.

2. Worker Testimony

In addition to logos, Plaintiff relies upon testimony from Mr. Rublee, one of Mr. Rublee's coworker at PSNS, an employee at a steel plant in Seattle, and an employee at a manufacturing plant in Cleveland, all of whom testified that they believed Insulag or Panelag to be Pfizer products. Pl. Br. 20-22 (citing CP 871, 879, 990-93, 998-99). Plaintiff contends that this testimony raises a genuine issue whether a reasonable consumer would have been confused regarding the actual manufacturer of the products. *Id.* at 19. In fact, this evidence is irrelevant because neither Mr. Ruble or the other workers purchased Insulag or Panelag, and therefore their impressions about who manufactured the products have no bearing on whether Pfizer "put out" the products as its own.[4]

As Plaintiff acknowledges, Pl. Br. 9, the apparent manufacturer doctrine is applied from the viewpoint of a reasonable purchaser. The doctrine is intended to protect purchasers from being unfairly misled:

> The primary rationale for imposing liability on the apparent manufacturer of a defective product is that it has induced the *purchasing public* to believe that it is the actual manufacturer, and to act on this belief—that is, to *purchase the product in reliance* on the apparent manufacturer's reputation and skill in making it.

Hebel, 442 N.E.2d at 203 (citations omitted, emphasis added). Accordingly, the "putting out" requirement "should be judged from the viewpoint of the *purchasing public*, and in light of the circumstances as of the time of purchase." *Id.* (emphasis added); *see also Stein*, 137 A.3d at 295 (applying the apparent manufacturer doctrine "from the perspective of an ordinary reasonable consumer or from the perspective of a reasonable purchaser in the position of the actual purchaser"); *Kennedy v. Guess*, 806 N.E.2d 776, 784 (Ind. 2004) ("Whether a 'holding out' has occurred should be judged from the viewpoint of the purchasing public").

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[4] Because the testimony of Mr. Rublee and the other workers is irrelevant, it is not necessary to consider whether their impressions qualify as reasonable in the face of the uncontroverted evidence that packages for Insulag and Panelag expressly stated that the products were "Manufactured By QUIGLEY COMPANY INCORPORATED." CP 567, 1821, 1824 (bold omitted).

There is no evidence that Mr. Rublee or the other workers whose testimony Plaintiff cites purchased Insulag or Panelag. Rather, the undisputed evidence shows that Insulag and Panelag were used in major industrial operations such as steel plants and shipyards, CP 915, 950, which presumably had specialized (and sophisticated) purchasing departments. Mr. Rublee did not work in the PSNS purchasing department: he was a machinist, CP 865-66, as was his co-worker Charles Edward, CP 877-78. Similarly, Lawrence Wedvik was a millwright, CP 990, and Joseph Vrcan was a crane operator, CP 997. Thus, there is no evidence that any of Plaintiff's witnesses played any role in purchasing Insulag or Panelag.

Indeed, Mr. Rublee did not even use Insulag or Panelag. Instead, Mr. Rublee testified that he was exposed to asbestos "lagging" when he performed work on turbines. Before he could work on the turbines, the existing insulation would be torn off, and once the work was completed, new insulation was added by "laggers," who often mixed Insulag or Panelag while he was in the engine room. CP 866-67; *see also* CP 877-78 (Edwards testifying to similar exposure); CP 998 (Vrcan).

The testimony of Mr. Rublee and the other workers about whom they thought produced Insulag and Panelag sheds no light on what the sophisticated purchasers at issue here would have thought because Mr.

Rublee and the other workers did not have access to any of the materials that would have been reviewed or exchanged in the purchasing process. Nor, for that matter, did they have any interest in determining who manufactured the products—which is, no doubt, why they could believe that Pfizer manufactured Insulag and Panelag when the labels for the products expressly state that they were manufactured by Quigley and that Quigley is a subsidiary of Pfizer.[5]

3. Purported Expert Testimony

In an apparent effort to distinguish this case from *Turner* and *Sprague*, which considered the logos and worker testimony discussed above and found it insufficient to raise a genuine issue, Plaintiff also submitted a declaration from Steff Geissbuhler, a "branding" expert, which she contends the trial court improperly disregarded. *See* Pl. Br. 23-26. Mr. Geissbuhler's opinion, however, suffers from the same defect as the testimony of Mr. Rublee and the workers: it does not address the understanding of a reasonable purchaser of Insulag and Panelag. Indeed, Mr. Geissbuhler was forced to admit that he "had no clear understanding

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[5] In addition to the testimony of Mr. Rublee and the other workers, Plaintiff also points to a supposed concession by Pfizer's corporate representative. Pl. Br. 19-20 (citing CP 919-20). This testimony, however, concerned the impressions that a single document would create "in the general public," CP 920, not what a reasonable purchaser would have believed in light of the circumstances at the time of the purchase.

of who was buying" Insulag and Panelag. CP 2169. He did not even know whether Insulag and Panelag may be purchased at a hardware store. CP 2125-26. As a consequence, his opinions concerned the understanding of what he called "an average consumer," CP 2212, not a reasonable purchaser of heat-resistant cement for industrial operations like steel plants and shipyards. Such an opinion is irrelevant and was properly disregarded. *See, e.g.*, *Hebel*, 442 N.E.2d at 203 (holding views of a "casual observer" irrelevant in evaluating representations to a "reasonable purchaser of car-washing equipment").

Mr. Geissbuhler's opinion also lacks a sufficient factual foundation. *See Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 493, 183 P.3d 283, 288 (2008) (expert opinions not supported by a sufficient factual foundation are "'insufficient to defeat a motion for summary judgment'"). That opinion was based on eight documents selected by Plaintiff's counsel. CP 2117. While Plaintiff contends that the trial court relied upon these eight documents, Pl. Br. 23, in fact the trial court stated that it had considered all the exhibits in the affidavits filed in connection with Pfizer's summary judgment motion. CP 2922-23. In addition, when Mr. Geissbuhler was shown other documents stating "[p]roducts manufactured by Quigley, a subsidiary of Pfizer, Inc," he admitted that an "average consumer" looking at this document would "think that Quigley

Company, Inc. was at least a manufacturer of the products identified here." CP 2241-22. Plaintiff's industrial hygiene expert, Dr. Susan Raterman, similarly acknowledged, based on her review of a Quigley catalog, product labels, and other materials not considered by Mr. Geissbuhler in formulating his original opinion, that "Quigley was responsible for manufacturing" Insulag and Panelag. CP 437-38. Thus, even if the view of an "average consumer" were relevant, Mr. Geissbuhler's opinion concerning that view would not raise any genuine issue in light of the documentary evidence noted above that Quigley repeatedly identified itself as the manufacturer of Insulag and Panelag, and Pfizer at its parent corporation. *See supra* pp. 17-26.

C. The Apparent Manufacturer Doctrine Does Not Apply To Pfizer Simply Because Its Logo Was Used In Connection With Insulag And Panelag

In addition to arguing that Pfizer put itself out as the manufacturer of Insulag and Panelag, Plaintiff argues that Pfizer may be held liable under the apparent manufacturer doctrine because it allowed its brand to be used on Insulag and Panelag to assuage health concerns. Pl. Br. 27-32. This argument is unavailing.

The apparent manufacturer doctrine does not regulate or punish the use of corporate logos and trademarks. Instead, as Plaintiff acknowledges, Pl. Br. 8, the doctrine is founded on an estoppel-based notion: vendors that lead purchasers to believe that vendors have manufactured a good should be subject to the same liability rules as manufacturers. *See Hebel*, 442 N.E.2d at 201, 203. Accordingly, "the overwhelming majority" of courts considering the issue "reject[] application of apparent manufacturer liability to a trademark owner not in the chain of distribution." *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1223 (10th Cir. 1997); *see also Nelson*, 734 F.2d at 1087-90 (refusing to apply apparent manufacturer doctrine to parent corporation because subsidiary used its trademark on product); *Fletcher*, 68 F.3d at 1463 (use of logo on promotional and advertising materials insufficient); *Torres*, 867 F.2d at 1236 (use of trademark under licensing agreement).

Trademark owners are only liable for harm caused by defective products distributed under their trademark "when they participate substantially in the design, manufacture, or distribution" of the products carrying the mark. Restatement (Third) of Torts: Prods. Liab. § 14, cmt. *d*. Plaintiff, however, is unable to point to any evidence of such participation by Pfizer. *See Stein*, 137 A.3d at 299 ("Although Pfizer's trademark appeared on Quigley's invoices and promotional materials, no evidence was presented that Pfizer participated 'substantially [or for that matter, at all] in the design manufacture, or distribution of' Insulag.") (alteration in original).

The only authority that Plaintiff proffers in support of her trademark theory is a passage from the Restatement (Second) of Torts. *See* Pl. Br. 27. The newest Restatement, however, recognizes that the apparent manufacturer doctrine "does not, by its terms, apply to the owners of a trademark who license a manufacturer to place the licensor's trademark or logo on the manufacturer's product and distribute it as though manufactured by the licensor" unless the trademark owner "participates in the design, manufacture, or distribution" of the products bearing the marks. Restatement (Third) of Torts: Prods. Liab. § 14, cmt. *d.*

Moreover, Plaintiff's quotation from the Restatement (Second) is misleading. As Plaintiff observes, the Restatement noted that, when a trademark is used to indicate quality of wholesomeness, there is "an added emphasis that the user can rely upon the reputation of the person" identified by a trademark. Restatement (Second) of Torts §400, cmt. *d.* The Restatement, however, did not indicate that this "added emphasis" is enough by itself to establish liability. It merely noted that, where a trademark is used, describing the seller as distributor or saying goods were "made for" the seller may not be enough to avoid "putting out" a product. *Id.* Even more important, the Restatement goes on to state that the apparent manufacturer doctrine is inapplicable "where the real manufacturer or packer is clearly identified on the label" and it is clearly indicated that the party in question did not produce them. *Id.* That is plainly the case here: the label for Insulag and Panelag states that Quigley is the manager and that Pfizer is its parent. CP 567, 1821, 1824.

Thus, Plaintiff's trademark theory has no basis, and the trial court correctly ruled that her apparent manufacturer claim fails because she has failed to raise a genuine issue concerning the "putting out" requirement.

II. THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFF FAILED TO RAISE A GENUINE ISSUE CONCERNING RELIANCE

The trial court also correctly dismissed Plaintiff's apparent manufacturer claim on a second, independent ground: Plaintiff failed to raise a genuine issue concerning reliance.

As noted above, reliance is an essential element of an apparent manufacturer claim. The "primary rationale" for imposing liability on the apparent manufacturer of a defective product is that the company "has induced the purchasing public to believe it is the actual manufacturer and to buy the product in reliance on the vendor's reputation and care in making it." *Hebel.*, 442 N.E.2d at 200-02 (emphasis omitted). Accordingly, a plaintiff bringing an apparent manufacturer claim must establish reasonable reliance, *Carney*, 309 F.2d at 304 ("the basic test is whether or not the vendee reasonably believed in and relied upon the vendor's apparent manufacture of the product"); *Mello v. K-Mart Corp.*, 604 F. Supp. 769, 773 (D. Mass 1985) ("The crucial factor determining a retailer's amenability to suit on a theory of negligence is whether the labeling on a particular product is likely to cause a consumer to rely on the retailer's reputation as an assurance of the product's quality."), and their claims fail if they cannot establish actual reliance, *see, e.g.*, *Yoder v. Honeywell Inc.*, 900 F. Supp. 240, 245 (D. Colo. 1995), *aff'd*, 104 F.3d 1215 (10th Cir. 1997); *Bernier v. One World Techs., Inc.*, 746 F. Supp. 2d 240, 243 (D. Mass. 2010); *Stones v. Sears, Roebuck & Co.*, 558 N.W.2d 540, 545 (Neb. 1997); *Sherman v. Sunsong Am. Inc.*, 485 F. Supp. 2d 1070, 1079-80 (D. Neb. 2007).

As the trial court correctly recognized, Plaintiff cannot show that a reasonable purchaser would have concluded that Pfizer was manufacturing Insulag and Panelag based on the use of Pfizer logos in promotional materials concerning the products. Insulag and Panelag were specialized industrial products purchased for use in shipyards, steel mills, power plants, and other industrial settings. CP 1788 (listing boiler plants, chemical plants, oil refineries and smelters as other industries that could use Quigley's products). These sophisticated entities had experienced purchasing agents who had purchased these products from Quigley for decades prior to Pfizer's acquisition of the company. *See, e.g.*, CP 1840-

41, 2418-36. Moreover, Quigley's customers continued to meet regularly with Quigley salespeople, CP 377, 390-91, and correspond directly with Quigley about product issues, CP 618, 963, 1806, 2637, 2634, 2653. Especially in light of the repeated statements in labeling, material safety data sheets, invoices, catalogues, product packaging, and correspondence correctly identifying Quigley as the manufacturer, no reasonable purchaser would have inferred from the addition of Pfizer logos to promotional materials and letterhead that Pfizer had become the manufacturer of Insulag and Panelag.

The Maryland Court of Special Appeals reached the same conclusion in the *Stein* case when it considered an apparent manufacturer claim against Pfizer relating to Insulag and Panelag:

> Given that Bethlehem Steel was unquestionably a sophisticated purchaser of Insulag and that Insulag was not a consumer product, we believe that no reasonable fact finder could conclude that a reasonable person, in the position of a Bethlehem Steel purchasing manager during the period from 1968 through 1974, who had purchased Insulag for decades from Quigley, could have purchased Insulag in reliance upon Pfizer's reputation and assurances of quality.

Stein, 137 A.3d at 296-97.

In addition, there is uncontroverted evidence that purchasers knew that Quigley remained the manufacturer and distributor of Insulag and Panelag. Lone Star Industries—the Quigley distributor who Plaintiff alleges sold the Insulag and Panelag used at the Naval Shipyard—sent purchase orders for the products to Quigley after Pfizer acquired Quigley CP 1826-31, 1833-34. When Lone Star had questions about Insulag and Panelag, it wrote to Quigley, not Pfizer. CP 2637, 2634, 2653. And Lone Star advertised and distributed Insulag and Panelag using the Quigley name, CP 2595, 2599, 2603; *see also* CP 2634, 2645. In addition, a former Lone Star employee confirmed during his deposition in this case that he understood Insulag and Panelag were "Quigley refractory products," CP 2637; *see also* CP 2634, 2653, and that Lone Star was a local representative of and distributor for Quigley, CP 2634, 2645.

Other purchasers similarly understood that Insulag and Panelag were Quigley products. For example, Bethlehem Steel's General Foreman, who worked at Bethlehem Steel from 1953 through 1985 and was personally involved in selecting the products used at the steel mill, testified that "it was Quigley" that sold Insulag. CP 490. Other Bethlehem Steel personnel similarly testified that Insulag was a Quigley product. CP 459, 467-68 (James Walczak); CP 503, 511, 516-17, 523, 527, 596, 609 (Paul Wright).

Thus, undisputed evidence establishes that there was no reliance, reasonable or actual, on any representations that Pfizer was the manufacturer of Insulag and Panelag.

III. IN THE ALTERNATIVE, PLAINTIFF'S APPARENT MANUFACTURER CLAIM FAILS BECAUSE PFIZER DID NOT SELL OR DISTRIBUTE INSULAG OR PANELAG

Even if the evidence presented by Plaintiff were somehow sufficient to raise genuine issues concerning the "putting out" and reliance requirements, Plaintiff's apparent manufacturer claim still would fail for a third, independently dispositive reason not reached by the trial court: it is undisputed that Quigley, not Pfizer, distributed Insulag and Panelag, and the apparent manufacturer doctrine applies only to parties that sell or distribute the product in question.

It is well-settled that the apparent manufacturer doctrine applies only to sellers and others in chain of distribution. As the United States Court of Appeal for the Tenth Circuit has observed, "the overwhelming majority of the opinions reject[] application of apparent manufacturer liability to a trademark owner not in the chain of distribution." *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997); *see also Fletcher*, 68 F.3d at 1463 (holding the apparent manufacturer doctrine inapplicable to a party outside the chain of distribution because "no New York court has ever extended liability under the doctrine to anyone other than sellers of products manufactured by third parties."); *Torres*, 867 F.2d at 1236 ("section 400 applies only where a retailer or distributor has held itself out to the public as the manufacturer of the product"); *Affiliated FM Ins. Co.*

v. Trane Co., 831 F.2d 153, 156 (7th Cir. 1987) (rejecting apparent manufacturer claim where parent was "not involved in the manufacture, sale or installation" of product); *Nelson*, 734 F.2d at 1085-90 (rejecting "apparent manufacturer" claim based on use of parent's logo because parent "did not design, manufacture, or market" the product in question); *In re TMJ Implants Prods. Liab. Litig.*, 880 F. Supp. 1311, 1321 (D. Minn. 1995) (use of the Dow Corning mark on allegedly faulty implant product created no liability for parent companies Dow Chemical and Corning when parents did not "manufacture or otherwise participate in the chain of distribution of the product"), *aff'd*, 113 F.3d 1484 (8th Cir. 1997).

The Restatement (Second) of Torts recognized that the apparent manufacturer doctrine is limited to sellers and others in the chain of distribution. It is titled "***Selling*** as Own Product Chattel Made by Another." Restatement (Second) of Torts § 400. And it states that the doctrine applies to "one who puts out as his own product a chattel manufactured by another" and that these words "include anyone who ***supplies*** [the chattel] to others for their own use or for the use of third persons." Restatement (Second) of Torts § 400, cmt. *a*. Moreover, all of the cases cited by the Restatement (Second) deal with sellers and distributors. *See id.*, Reporter's Note (citing *Burckhardt v. Armour & Co.*, 161 A. 384 (Ct. 1932); *Armour & Co. v. Leasure*, 9 A.2d 572 (Md. Ct. App. 1939); *Swift & Co. v. Hawkins*, 164 So. 231 (Miss. 1935); *Slaving v. Francis H. Leggett & Co.*, 177 A. 120 (N.J. Ct. App. 1935); *Swift & Co. v. Blackwell*, 84 F.2d 130 (4th Cir. 1936); *Dow Drug Co. v. Nieman*, 13 N.E.2d 130 (Ohio Ct. App. 1936); *Tiedje v. Haney*, 239 N.W. 611 (Minn. 1931)).

The Restatement (Third) is even more explicit. It expressly limits the apparent manufacturer doctrine to parties within the chain of distribution by describing the doctrine as applying to one involved in the business of "selling or otherwise distributing" who "sells or distributes" a product. *See* Restatement (Third) of Torts: Prods. Liab. § 14 ("One engaged in the business of selling or distributing products who sells or distributors as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.").

The chain of distribution requirement has even been applied to apparent manufacturer claims against Pfizer. *Turner* rejected the argument that the apparent manufacturer doctrine should be construed broadly to "hold[] a non-distributor liable if it allowed its name to be placed on a product." 2013 WL 7144096, at *2. Relying on the Ninth Circuit's decision in *Torres* and the Tenth Circuit's decision in *Yoder*, the

Turner court held that the apparent manufacturer doctrine applies only to parties in the chain of distribution:

> An actor who allows his name or trademark to be placed upon a product, but plays no role in the distribution or supply of that product, does not 'put out' the product and therefore does not fall within the scope of § 400.

Id. (footnote omitted). Similarly relying on the *Torres* decision, the *Sprague* court held that the plaintiff had failed to state a claim under the apparent manufacturer doctrine because he had failed to show "that Pfizer was in the chain of distribution." 2015 WL 144330, at *3-4.

Anticipating the objection that the apparent manufacturer doctrine applies only to sellers and others in the chain of distribution, Plaintiff tries to downplay *Turner* and *Sprague* as "non-binding holdings" of federal trial courts. Pl. Br. 10-11.[6] Plaintiff fails, however, to acknowledge that *Turner* and *Sprague* applied the "overwhelming majority" view, *Yoder*, 104 F.3d at 1215, adopted by the Restatement, that the apparent manufacturer doctrine is limited to sellers and distributors and does not

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[6] Plaintiff also asserts that the trial court rejected *Turner* and *Sprague* in stating that the evidence should be considered "though the prism of what would have been apparent to a reasonable purchaser." CP 2923 (emphasis and footnote omitted). Far from suggesting that the apparent manufacturer doctrine imposes liability on parties outside the chain of distribution, this passage recognizes that "whether a holding out has occurred must be judged from the viewpoint of the purchasing public and in light of the circumstances as of the time of purchase," *Hebel*, 442 N.E.2d at 203—a principle that Plaintiff fails to honor, *see supra* pp. 28-31.

extend to parties outside the chain of distribution who merely lend their trademark to a product. *See id.*; *Nelson*, 734 F.2d at 1087-90; *Torres*, 867 F.2d at 1236; Restatement (Third) of Torts: Prod. Liab. § 14.

Nor does Plaintiff offer a persuasive reason for departing from this majority view. Without citing any authority, Plaintiff asserts that the "'put out' inquiry under Section 400 is focused on consumer expectations." Pl. Br. 10. While that is true, it does not follow that the apparent manufacturer doctrine should be expanded to regulate or punish the use of corporate trademarks by parties outside the chain of distribution, or that the doctrine should be interpreted to intrude on other areas of the law protecting consumers from misrepresentations. To the contrary, one of the original justifications for the apparent manufacturer doctrine was that, "where a defendant puts out a product as its own, the purchaser has no means of ascertaining the identity of the true manufacturer," and it is fair to impose liability on the party "whose actions effectively conceal the true manufacturer's identity." *Hebel*, 442 N.E.2d at 201-02 (citing *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 A. 385, 391 (1932); *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 223, 279 N.E.2d 266, 273 (1972)). This rationale does not apply where, as here, there is an already identifiable seller that can be sued. Thus, there is no need to expand the apparent manufacturer doctrine to cover the use of trademarks and logos of parties outside a product's chain of distribution.

Plaintiff argues that it would be "anomalous" to require participation in the chain of distribution because the strict liability doctrine already applies to parties in the chain of distribution, and the apparent manufacturer doctrine should be interpreted to serve a different purpose. Pl. Br. 11. This argument turns the historical development of products liability law on its head. Contrary to Plaintiff's unstated assumption, strict products liability and the apparent manufacturer doctrine were ***not*** designed to coexist. Instead, it is widely recognized that strict products liability superseded the apparent manufacturer doctrine, depriving the doctrine of relevance and rendering it "quaintly obsolete." *Stein*, 137 A.2d at 290 & n. 15; *see also* Restatement (Third) of Torts: Prods. Liab. § 14, cmt. *a* ("After inclusion of § 402A in the Restatement, Second, imposing strict liability on all commercial sellers of defective products for harm caused by product defects, it was questionable whether § 400 remained relevant in the context of products liability."). The objective of both doctrines is "to provide a remedy for consumers injured by unsafe products," and because strict products liability achieves this objective, "the function of the apparent-manufacturer doctrine has, as it were, been absorbed by the theory of seller's strict liability." *Hebel*, 442 N.E.2d at 202.

Thus, Plaintiff has failed to offer any persuasive reason for departing from the Restatement and the overwhelming majority view to expand the obsolete and moribund apparent manufacturer doctrine to apply outside the chain of distribution and allow it to circumvent the channeling injunction requiring her to bring her claim to the asbestos injury trust established in Quigley's bankruptcy.

CONCLUSION

The judgment of the Superior Court of Washington for King County in favor of defendant Pfizer Inc. should be affirmed.

DATED: November 10, 2016

Respectfully submitted,

s/ Sheila L. Birnbaum

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DECLARATION OF SERVICE

I, Cynthia Daniel, hereby certify as follows:

I am employed in the County of King, State of Washington, I am over the age of 18 and not a party to the within action. My business and place of employment is Betts Patterson & Mines, 701 Pike Street, Suite 1400, Seattle, Washington, 98101.

On the date set forth below, I served the foregoing document on the interested parties in this action via email addressed as follows:

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DATED this 10th day of November, 2016 at Seattle, Washington.

/s/ Cyndi Daniel
Cynthia Daniel